FILE COPY

No.....

FILED

JAN 29 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

72-1047

WEATHER WISE COMPANY,
Petitioner

v.

AEROQUIP CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C. BENTON MUSSLEWHITE &
THOMAS R. BEECH
HOLLAND & BEECH
1210 Chamber of Commerce Bldg.
Houston, Texas 77002

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Facts	3
Reasons for granting the writ	8
Conclusion	13
Appendix A	14

CITATIONS

Cases:

Albrecht v. The Herald Company, 390 U.S. 145 (1968)	9
In re Greene, 52 F. 104, (C.C.S.D. Ohio 1892)	8
Northern Securities Co. v. U. S., 193 U.S. 197 (1904)	9
Standard Oil Co. v. U.S., 221 U.S. 1, 31 S.Ct. 502 (1911)	8
U. S. v. Arnold, Schwinn Co., 388 US. 365 (1967)	12
U. S. v. Colgate & Co., 250 U.S. 300 (1919)	8
U. S. v. Parke, Davis & Company, 362 U.S. 29 (1960)	11

Statute:

Section 1 of the Sherman Act (26 Stat. 209, 15 U.S.C.A. 1)

IN THE

Supreme Court of the United States

October Term, 1972

No.....

WEATHER WISE COMPANY,
Petitioner

v.

AEROQUIP CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Weather Wise Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 14-17) is not yet officially reported. The United States District Court for the Southern District of Texas did not render a written decision in this case, but rendered judgment (J.A. 69-70).[1]

---

[1] "J.A." refers to the Joint Appendix in the Court of Appeals.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1972 (App. A, *infra*, p. 14). The jurisdiction of this Court invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the term "combination" in construing the Sherman Act, and the definitions as stated in the recent Supreme Court case of *Albrecht* v. *Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968), a price fixing combination, applies to cases of refusal to deal and other unreasonable restraints of trade.

STATUTE INVOLVED

This case was brought under Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C.A. 1.

STATEMENT

On September 3, 1969, Weather Wise Company, (hereinafter referred to as Weather Wise) filed a complaint against Aeroquip Corporation, (hereinafter referred to as Aeroquip) alleging, in part, that Aeroquip not only refused to sell but did so in combination with competitors of Weather Wise and threatened its customers against selling to Weather Wise.

Trial began on November 8, 1971, and on November 16, 1971, the jury returned its verdict finding that Aeroquip's sales policy in its application unreasonably restrained trade in violation of Section 1 of the Sherman Act.

The jury verdict returned damages of $65,000.00, which was trebled. The Federal District Judge found a combination existed between Aeroquip and its Original Equipment Manufacturer customers as a matter of law.

Aeroquip's request that the jury make such finding of combination was denied by the judge. Aeroquip then appealed to the United States Court of Appeals for the Fifth Circuit. The U. S. Court of Appeals for the Fifth Circuit found as a matter of law that the required combination under Section 1 of the Sherman Act did not exist and reversed and rendered the judgment obtained by Weather Wise.

FACTS

Aeroquip's 5700 Series coupling is patented and is so efficient a device for precharging that it is used by a majority of manufacturers in the entire air conditioning industry (J.A. 285-288). There are eighty such manufacturers, including most of the large air conditioning manufacturers such as Fedders, Trane, York, General Electric, Friedrich, and Westinghouse (J.A. 289-291, 328-336). Such manufacturers make all three parts of an air conditioning system and thereby qualify as an OEM[2] customer of Aeroquip.

When such manufacturers install a 5700 coupling on any part of an air conditioning system it must be installed on the remaining component parts of that system to be sold competitively (J.A. 110-113, 171, 275-276). So in every case where an OEM condenser is sold to any customer who wants to use a vendor[3] manufactured air handler, that vendor must obtain the 5700 coupling to install on his air handler. By definition a vendor only manufacturers a part of an

---

[2] "OEM" used throughout this Brief refers to original equipment manufacturers as defined in Aeroquip's Sales Policy on 5700 Series couplings to mean those manufacturers who make a complete air conditioning system, all three parts — condensor, air handler, and connecting lines, and who are Aeroquip customers.

[3] "Vendors" used throughout this Brief means manufacturers of component parts of an air conditioning system, in other words, manufacturers who do not manufacture a complete system.

air conditioning system so in any sales it makes its product must be matched to a product manufactured by someone else, an OEM.

Aeroquip developed a sales policy for marketing the 5700 Series coupling that was stated in a letter Aeroquip sent to Weather Wise in May, 1969, and is as follows:

> "It has always been our policy to sell Aeroquip 5700 refrigerant couplings to original equipment manufacturers of complete refrigeration/air conditioning systems who possess all of the following qualifications:
>
> "1. Manufacturers a complete refrigeration system.
>
> "2. Sells a complete system.
>
> "3. Services a complete system.
>
> "4. Engineers a complete system.
>
> "5. Advertises a complete system.
>
> "6. Maintains facilities capable of properly processing Aeroquip couplings into his system to insure maximum quality control.
>
> "There has been one exception to this policy. Our 5700 couplings have been sold to vendors of components where the qualified OEM has requested us to do so. In these cases, the OEM has maintained engineering control over such components.
>
> . . . "If you are supplying components to qualified original equipment manufacturers using 5700 couplings, we will accept orders for the number of couplings you require as a vendor, *provided we receive written authorization from the qualified manufacturers.*" (J.A. 344-346). (Emphasis Added)

When Weather Wise asked for more specifics from Aeroquip on this sales policy, Aeroquip replied by letter dated June 25, 1969, as follows:

"Any original equipment manufacturer of complete air conditioning systems using Aeroquip 5700 couplings *may authorize us to sell on a direct basis any specific quantity of couplings* to his designated component manufacturer. The original equipment manufacturer, as defined in our letter to you of May 20, should write to us specifying the following:

"1. Name of his vendor.

"2. Where to ship the couplings.

"3. Quantity of each Aeroquip part number required." (J.A. 98). (Emphasis Added)

Aeroquip officers explained that the OEM had to furnish the quantity of each Aeroquip part number required, as well as the name of the vendor and where to ship the couplings, for each and every sale to a vendor (J.A. 88, 99, 102).

The admitted reason Aeroquip had for developing this sales policy was to, "maintain the integrity of refrigeration systems", and that such integrity was not maintained when, "components of the systems are manufactured by people other than those who designed the system in toto." (J.A. 86-89, 130-132). Aeroquip admits that the couplings themselves were a relatively small part of the reason for such policy (J.A. 87-88).

An officer of Borg-Warner Corporation (York) explained the advantages of Aeroquip's sales policy to an OEM, and testified that it enables the OEM to sell its complete air conditioning system and prevented vendors from selling their products to match up to OEM made products (J.A. 256-257)

Aeroquip admits that it will not sell to any vendors unless it receives a letter from one of its OEM customers authorizing it to make such sales (J.A. 88, 90-91, 102, 273). The record clearly establishes that the OEM and not Aeroquip determined whether a particular vendor was able to

purchase the coupling from Aeroquip. In the case of one vendor, Metal Fab., Inc., who had an Aeroquip OEM as a good friend, it obtained an authorization letter entitling it to purchase fittings direct from Aeroquip, though it manufactured nothing for the OEM (J.A. 126-129).

Other vendors obtained OEM authorizations because they sold their products to the OEM (J.A. 88). They could usually obtain more couplings from Aeroquip than were required to merely fill the orders to the OEM. In such cases, these vendors could use the extra couplings on its products and sell them to the customers of other vendors who could not obtain the couplings. The record shows that this occurred when Magic Aire, a vendor, obtained written authorization from General Electric, to whom it sold, that enabled it to buy the 5700 couplings from Aeroquip in sufficient number to be able to supply a customer of Golden Crescent Sales, also a vendor, who had no letter and, therefore, could not get enough fittings (J.A. 116-119, 149-151, 326-327).

Such vendors could also sell the excess couplings on the black market for a nice profit. The black market arose from the simple fact that those vendors who could not buy the couplings from Aeroquip had to obtain them from somewhere if they wanted to sell their product to be matched with any product manufactured by an Aeroquip OEM, so they phoned and visited other vendors and bought, sold, traded and borrowed couplings (J.A. 112, 116, 230-232, 270-271, 276-277). Most such purchases were at premium prices, as in the case of Weather Wise to the tune of some $45,000.00.

Weather Wise manufacturers air handlers and in the early part of 1969, entered into an agreement with Cambridge-Lee to manufacture and market tube sets (J.A. 181-

182, 183-184). Aeroquip also decided to manufacture and market its own line of tube sets and began a national advertising program in January, 1969 (J.A. 84-85).

Sometime in February, 1969, Darvin Watson, President of Weather Wise, contacted Aeroquip and attempted to purchase the required 5700 coupling (J.A. 89). When refused the right to purchase such couplings, Mr. Watson complained that Golden Crescent Sales and other vendors in competition with Weather Wise were obtaining the coupling direct from Aeroquip and even had enough to resell some (J.A. 89-90).

Aeroquip's Marketing Manager, Frank Foley, then wrote letters in May, 1969, to some five vendors, including Weather Wise and initiated a check on the qualifications of other vendors by Aeroquip's salesmen throughout the United States to make sure that the sales policy was followed (J.A. 88-91, 336-346).

Prior to this time, 1969, Aeroquip was admittedly lax in the enforcement and administration of its sales policy on the 5700 coupling (J.A. 81-82).

In the face of Aeroquip's refusal to sell the 5700 couping directly to Weather Wise, arrangements were made to purchase a sufficient number of couplings from Southwest Manufacturing Company — a fully qualified OEM of Aeroquip (J.A. 136-137). But Mr. J.C. Owens, President of Southwest, testified that Aeroquip refused to fill one of his company's orders for couplings because Aeroquip found out Southwest was going to resell them (J.A. 136-139). In making such refusal, Aeroquip Sales Representative, Sam Thomas, answered President Owens' inquiry as to whether Aeroquip would continue to supply Southwest's requirements for 5700 couplings, by stating, "Well, I think they will go ahead and honor that order." (J.A. 136-137).

The record further shows that Sam Thomas, Aeroquip Sales Representative, told Mr. Charlie Siegal, President of Golden Crescent Sales Corporation, when his company was also a qualified Aeroquip OEM, that he could, "definitely not resell" the couplings (J.A. 114-115).

Solely because of the inability to obtain a sufficient supply of 5700 couplings, Weather Wise was forced out of the tube set line business and lost a substantial amount of business for its air handlers (J.A. 185-186, 228-230, 264-267).

REASONS FOR GRANTING THIS WRIT

The issue of whether and under what circumstances a "combination" exists within the meaning of Section 1 of the Sherman Act is an important and recurrent one in the administration of our national antitrust laws. The court below erroneously relied on the outmoded and much qualified *Colgate* doctrine, *United States* v. *Colgate Co.*, 250 U.S. 300 (1919), in holding that there was no Sherman Act combination possible in the instant case. The court's decision conflicts with this court's decisions in *Albrecht* v. *The Herald Company*, 390 U.S. 145 (1968), *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960), and *U.S.* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967).

1. In construing the Sherman Act, it was early recognized that resort must be had to the common law in order to ascertain the meaning of the terms "contract, combination . . . or conspiracy in restraint of trade" and to determine whether or not particular acts come within the ambit of this section. In re *Greene*, 52 F.103 (C.C.S.D. Ohio, 1892); see *Standard Oil Co.* v. *United States*, 221 U.S.1, 31 S.Ct. 502, 55 L.Ed 619 (1911). These three terms have acquired somewhat unique meanings under this statute which distinguish them from traditional definitions normally employed in other areas of the law.

The statutory term, "combination," is normally defined as a union or association of two or more persons for the achieving of a common object. *Northern Securities Co.* v. *United States*, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed 679 (1904). However, a combination can also be defined as a unilateral act committed by a first party in dealing with a second party wherein the latter concurs in the former's acts and related policies with knowledge of their intended effect. See *Albrecht* v. *Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968).

Aeroquip's sales policy enabled its OEM customers, who comprise a majority of all the air conditioning manufacturers in the United States, to sell their complete air conditioning systems — and prevented vendors, such as Weather Wise, from selling their products to match up to any of the OEM made products. As the court below found, "Without obtaining these couplings, a component made by a non-OEM manufacturer could not be attached to and integrated with the total OEM system." (App. A, *infra*, p. 16).

Recognizing this fact, Aeroquip's sales policy completely abrogated to its OEM customers and to them alone the right to select or reject the vendors who could purchase couplings from Aeroquip. The facts are undisputed that if an OEM wrote a letter authorizing Aeroquip to sell couplings to a particular vendor, Aeroquip sold. If the vendor could not get such an authorization, Aeroquip refused to sell. As Aeroquip's marketing manager put it, he has, since 1968, refused to sell to a vendor that was not authorized by an OEM (J.A. 90).

Moreover, for each subsequent sale to the vendor, Aeroquip required the OEM to specify and report back to it the quantity of couplings required, the name of the vendor, and where to ship the couplings.

The OEMs fully complied with the requirements of the sales policy with the result that Weather Wise was forced out of business and others who attempted entry into the air conditioning market failed or lost substantial business.

Petitioner asserts such facts constitute a stronger "combination" than one between a supplier and a distributor's former retail customers, who had been merely contacted by the supplier in an effort to take them away from the distributor, that this court found to constitute a "combination" under Section 1 of the Sherman Act in *Albrecht*.

2. At the time the Sherman Act was enacted, its draftors obviously could not forsee the many sophisticated business and economic arrangements in American industry that have emerged in recent years, nor could they anticipate the multiple varieties of innovative devices that have been conjured up by inventive businessmen in an effort to circumvent Section 1 of the Sherman Act.

Such is the case at hand, by the ingenious terminology of its sales policy, Aeroquip has achieved the ultimate goal of avoiding the most basic purpose of the Sherman Act — to prohibit practices which eliminate competition and tend toward monopoly. Aeroquip's customers name among the giants of the air conditioning industry, Fedders, Trane, York, General Electric, Westinghouse, with sales in the hundreds of millions of dollars.

Aeroquip's couplings range in the $0.54 (fifty-four cents) to $1.94 (one dollar ninety-four cents) price range, yet its sales for one year amounted to about six million dollars (J.A. 84, 377). The couplings are inexpensive in comparison to a compressor or air handler that costs several hundred dollars each. So to satisfy and protect its customers Aeroquip gave them the absolute right to authorize sales of the coupling to vendors. Couplings that the court below found to

be required by vendors to sell in connection with any OEM product using the coupling. Yet the court below found such authorization unimportant because it "extended" the customers Aeroquip would sell to. Thus, the court concluded that Aeroquip's refusal to deal was unilateral under the *Colgate* doctrine. (App. A, *infra*, p. 17). How can such an "extension" of customers satisfy the Sherman Act with OEMs controlling which of its competitors, i.e. vendors, could purchase the coupling that enabled them to compete for the entire OEM market that used Aeroquip couplings?

This court decided in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503 (1960), against a company's wholesale and retail resale price fixing efforts that had no actual "agreement". The firm had announced a policy of resale pricing. Its two-fold fault, in this court's view (as this court explained in *Albrecht*) was that, rather than enforcing the policy by merely refusing to deal with noncomplying dealers, (1) it created a combination with wholesalers, who cooperated by cutting off retailers who did not accede and (2) the company created a combination with retailers because their acquiescence in suggested prices was secured by threats of termination. Thus, the court observed the Section 1 Sherman Act necessity of a contract, combination, or conspiracy, concluding that the company's refusal to deal was not, in fact, wholly unilateral. The involvement of wholesalers and the discussions with retailers each amounted to going beyond the mere announcement of policy and simple refusal to deal apparently approved in *Colgate*.

Aeroquip here too has gone far beyond a mere announcement of its sales policy and a simple refusal to deal and the effect of that sales policy on small vendors, like Weather Wise, has not been questioned by Aeroquip.

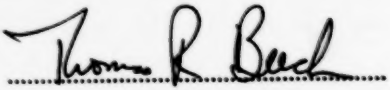
Weather Wise manufactured air handlers and tried to expand into the tube line business in 1969. That same year

Aeroquip entered into the tube line business for the first time and for the first time in 1969 Aeroquip began to really enforce its sales policy. That enforcement included stopping one of its OEM customers, Southwest Manufacturing Company, from supplying Weather Wise with couplings. Weather Wise was forced to end its tube line business and by the time of trial had one employee left. For as another vendor testified at trial regarding the necessity for the couplings, "They're my lifeline. I either do that or go out of business." (J.A. 114).

The court below held that Aeroquip's attempts to control its couplings after sale did not constitute resale restrictions violating *U. S.* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), "but were merely an attempt by Aeroquip to follow its own sales policy of not knowingly selling couplings for resale." (App. A, *infra*, p. 17). But the attempts to control resale were just one part of Aeroquip's entire sales policy that effectively prevented vendors from competing with Aeroquip's OEM customers. It would appear that the court below now creates an exception to *Schwinn* that would allow resale restrictions in compliance with an Aeroquip-type sales policy.

CONCLUSION

Petitioner respectfully submits that Aeroquip and its OEM customers should not have the right to join together and decide which vendors exist in the OEM air conditioning market and which *cannot* because they are unable to purchase the Aeroquip coupling and for the reasons stated, the petition for certiorari should be granted.



Thomas R. Beech
Attorney for Petitioner

JANUARY, 1973

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1348

WEATHER WISE COMPANY,
Plaintiff-Appellee,

v.

AEROQUIP CORPORATION,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(November 3, 1972)

Before DYER, SIMPSON and MORGAN, Circuit Judges.

DYER, Circuit Judge: This is an appeal from a judgment of the district court entered upon a jury finding that Aeroquip Corporation had engaged in unreasonable restraints of trade in violation of section 1 of the Sherman Act. In the charge to the jury the court instructed, as a matter of law, that the requisite combination in restraint of trade did exist. We reverse.

To understand the alleged Sherman Act violation in this case, it is necessary to have a basic understanding of one

segment of the air conditioning industry.[1] A complete air system consists of three parts: (1) a compressor or condensor; (2) an evaporating and air handling unit; and (3) a set of tubing that connects these two components, allowing the refrigerant to flow between them. Because an air conditioner must be a closed system and must contain only pure refrigerant, the components of the earliest systems were shipped to the point of installation without containing any coolant. There the parts were connected and, after an expensive and inefficient process, the system was charged with the coolant. The dissatisfaction with this procedure led to the development of components that could be charged at the factory and shipped ready for immediate installation and use. For the purposes of this case, the important aspect of this precharging process is the coupling device that allows the component to be charged and then connected to the other components without losing refrigerant or having the system become contaminated. Aeroquip is a manufacturer of such a coupling device and controls a substantial portion of the market.

The present controversy concerns Aeroquip's sales policy which limits its sales of couplings only to those companies who manufacture complete air conditioning systems. These manufacturers are called Original Equipment Manufacturers (OEM's). The stated reason for this policy is that this maintains the integrity of air conditioning systems and thereby assures quality control.

The only recognized exception to this policy, or a second portion of it, is that Aeroquip will sell to a component manufacturer if an OEM states in writing that the manufacturer is makng one part of the complete system for the OEM.

---

[1] This appeal is not concerned with one-piece air conditioners, but only with larger systems which have the various parts located separately.

Without obtaining these couplings, a component made by a non-OEM manufacturer could not be attached to and integrated with the total OEM system.

Weather Wise Company was a manfacturer of the air handling and tube set components found in a complete system, but, because it did not make compressors, it was not classified by Aeroquip as an OEM. Consequently, with no direct access to Aeroquip's couplings, Weather Wise either had to find an OEM which would state that Weather Wise was one of its suppliers, or it had to purchase from a direct customer of Aeroquip that had a surplus. Weather Wise was successful only with the latter approach and brought this action to recover treble the damages it suffered from the higher prices it paid for the couplings and from the sales lost as a result.

The determinative question on this appeal is whether the recited facts are sufficient to constitute a combination within the purview of the Sherman Act. The district court found, as a matter of law, that the writing of letters to Aeroquip by OEM's identifying the component manufacturers providing parts to the OEM's was sufficient cooperation with Aeroquip to constitute a combination under the Act. We disagree.

Because it was stipulated that Aeroquip's sales policy was established unilaterally, only the application of that policy could be questioned. Our examination of that application, however, shows that it is within the confines of *United States* v. *Colgate & Co.*, 1919, 250 U.S. 300, as narrowed by *United States* v. *Parke, Davis & Co.*, 1960, 362 U.S. 29, and *Albrecht* v. *Herald Co.*, 1968 390 U.S. 145. Aeroquip's activities, which included no attempt to control prices, were limited solely to its refusing to deal with manufacturers who did not qualify under its pre-existing sales policy. The writing of letters to Aeroquip by OEM's in no

way aided Aeroquip's refusal to deal, but instead was the only way that Aeroquip would *extend* its list of direct customers. In short, Aeroquip's refusal to deal was unilateral, and any combination that existed furthered distribution without restraining trade.

Whether Wise also urges that statements by Aeroquip personnel that an OEM was not to resell or that an OEM would not be sold couplings for resale constituted an illegal refusal to deal. It is clear, however, that such statements, if made, were only the result of Aeroquip's restating and following its own unilateral sales policy.

Whether Wise's final assertion is that these statements amount to restrictions on the resale of the couplings in violation of *U.S.* v. *Arnold, Schwinn & Co.*, 1967, 388 U.S. 365. This argument also is not persuasive because Aeroquip's actions did not constitute resale restrictions but were merely an attempt by Aeroquip to follow its own sales policy of not knowingly selling couplings for resale.

Because our finding that there was no Sherman Act combination disposes of this appeal, we do not reach the questions of the propriety of using deposition summaries[2] or of the correctness of admitting certain documents as business records.

The judgment of the district court is reversed and judgment is rendered for Aeroquip Corporation.

REVERSED and RENDERED

---

[2] We nevertheless take note that the use of deposition summaries in jury cases is, to say the least, highly unusual. The problem presented here is non-recurring, however, because the local rule under which these summaries were apparently authorized has been changed.

FILE COPY

Supreme Court, U. S.
FILED
FEB 21 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1047

WEATHER WISE COMPANY,
Petitioner,

v.

AEROQUIP CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN LEROY JEFFERS
First City National Bank Building
Houston, Texas 77002
Attorney for Respondent Aeroquip Corporation

Of Counsel:

ROSS N. STERLING
VINSON, ELKINS, SEARLS, CONNALLY & SMITH
2100 First City National Bank Building
Houston, Texas 77002

JOHN H. SCHOMER
DOMKE, MARCOUX, ALLEN & BEAMAN
1100 City Bank Building
Jackson, Michigan 49021

FIDELITY PRINTING COMPANY, INC., HOUSTON

TABLE OF CONTENTS

	Page
Statement of the Case	1
Statement of Facts	3
Argument	8
Conclusion	19
Certificate of Service	21

LIST OF AUTHORITIES

Authority

Albrecht v. Herald Co., 390 U.S. 145 (1968)	8, 9, 15, 17
Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441 (1921)	13
Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208 (1920)	13
United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967)	18
United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944)	13
United States v. Colgate & Co., 250 U.S. 300 (1919)	9, 12, 13, 14, 16, 18
United States v. Parke, Davis and Co., 362 U.S. 29 (1960)	9, 12, 13, 16

OTHER AUTHORITIES

Section 4 of the Clayton Act, 15 U.S.C.A. 15	3
Sherman Act, 15 U.S.C.A. 1	2, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1047

WEATHER WISE COMPANY,

Petitoner,

v.

AEROQUIP CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This Petition results from an antitrust treble damage action brought by Petitioner, Weather Wise Company (Weather Wise), originally against Aeroquip, General Electric Company and Chrysler Airtemp Sales Corporation alleging violations by the defendants of Section 1 of the Sherman Act, 15 U.S.C.A. 1[1]. The complaint generally alleged that the violations of the statute grew out of the conduct of the defendants which Weather Wise claimed had prevented Weather Wise from obtaining for use in its business a patented coupling device manufactured by Aeroquip which is used in the air conditioning industry for the connection of the various components of an air conditioning system (R. Inst. No. 9).

[1] The pertinent parts of the statute involved are:
Section 1, Sherman Act:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade among the several States . . . is declared to be illegal . . . ."

Other defendants were named in an amended complaint, but the case went to trial before a jury upon final pleading by Weather Wise and a pretrial order in which the only remaining defendants were Aeroquip and General Electric (R. Inst. No. 96). At the close of Plaintiff's evidence, Aeroquip and General Electric moved for directed verdicts on the ground that plaintff's evidence raised no issue which could be submitted to the jury which would support a finding of an illegal combination, contract or conspiracy under Section 1 of the Sherman Act. Before any ruling on this motion was obtained from the trial court, General Electric went out of the case and the court permitted the plaintiff to reopen its evidence against Aeroquip. After plaintiff had rested for the second time, (R. 632), Aeroquip renewed its Motion for Directed Verdict which was denied (R. 632 and 634).

In its charge to the jury, the trial court refused to give the requested instructions of Aeroquip (R. Inst. No. 98), and over the strenuous written (R. Inst. No. 94) and oral (R. 715) objections of Aeroquip instructed the jury as a matter of law that a combination had been formed between Aeroquip and its customers which was within the prohibitions of Section 1 of the Sherman Act (R. 702). The court, having thus instructed the jury that a combination within the Section 1 had been formed, inquired of the jury by special interrogatories whether such combination unreasonably restrained trade or commerce in "the business of manufacturing air conditioning equipment" and, if such first special interrogatory were answered in the affirmative, what amount of damages proximately resulted to Weather Wise (R. 712).

The jury answered the first special interrogatory in the affirmative and awarded damages in the amount of $65,000 (R. 720).

Aeroquip timely filed its Motion for Judgment notwithstanding the verdict (R. Inst. No. 100) which was overruled (Docket entry dated 2-6-71). The court entered judgment for Weather Wise in the amount of $210,000 (R. Inst. No. 109). That amount was determined by multiplying the amount of the jury verdict, i.e., $65,000, by three as required by Section 4 of the Clayton Act, 15 U.S.C.A. 15, to obtain the figure of $195,000, adding thereto the sum of $30,000 as attorneys' fees which were determined by the court, and deducting from the total $15,000, the amount previously obtained by plaintiff in settlement agreements with the six defendants which had come into and gone out of the case prior to the entry of judgment.

An appeal was taken by Aeroquip to the United States Court of Appeals for the 5th Circuit. That Court reversed the trial court and rendered a judgment in favor of Aeroquip on November 3, 1972.

The Petition for Certiorari followed.

STATEMENT OF FACTS

The facts as recited by the 5th Circuit in its opinion are concise and clearly support the opinion. However, the facts as recited by Petitioner Weather Wise are somewhat distorted to say the least and could be misleading. Aeroquip therefore provides the Court with this additional factual background.

This case turns around the inability of Weather Wise to purchase direct from Aeroquip a patented refrigerant coupling variously denominated as the 5700 Series coupling or quick connect coupling used by some manufacturers of air conditioning equipment for the necessary connections between the various component parts of an air conditioning system when those components are separated from each

other by some distance so that the components cannot be assembled together as a unit at the time of manufacture (R. Inst. No. 9).

In general terms, an air conditioning system is composed of three major components. These components are: (1) the compressor or condensing unit in which a gaseous refrigerant is, by a process of compression and cooling, reduced to a liquid for reevaporation into a gaseous state to produce the cooling or heat absorbing function of the system; (2) the evaporating and air handling section in which the liquid refrigerant is, by controlled expansion, returned to a gaseous state inside a finned coil over which air is forced and thereby cooled for distribution throughout the area to be air conditioned; and (3) the tubing which connects the condensing unit with the evaporating unit by which the liquid refrigerant is transmitted to the evaporating unit and the gaseous refrigerant returned to the condensing unit (R. Inst. No. 9).

An air conditioning system, to operate efficiently and reliably, must be a closed system in which only the refrigerant is contained without the presence of moisture, air or any other contaminant (R. 187). In the infancy of air conditioning, the charging of an air conditioning system where the entire system could not be assembled at the factory because the various component parts were split,[2] the charging process was accomplished in the field at the time of installation. This was done by connecting the necessary tubing to the compressor and the evaporator by brazing in the field and then applying a vacuum to the system for a

[2] A split system is the typical one with which eveyone is familiar in which the compressor is mounted remotely from the evaporator and air handler of a central home air conditioning system with the compressor in the yard and the evaporator in the attic. The 5700 Series coupling is used on split systems up to five tons of cooling capacity.

period of some hours to remove moisture from the system and thereafter charging the system with refrigerant. To render the completed system truly efficient, the amount of refrigerant added must be carefully controlled. Under such field installation conditions, the amount of refrigerant charged into the system and the cleanliness of the system could not always be easily controlled (R. 239). This method of assembly and charging of split air conditioning systems in the field was inefficient, expensive and sometimes unreliable (R. 506). Through the years a concept of precharging of each component at the factory of the manufacturer of a system was developed. By precharging each of the component parts, the manufacturer became able to control under ideal factory conditions the cleansing and charging of each portion of the system which could then be comparatively easily connected at the time of field installation. (R. 506).

The Aeroquip 5700 Series coupling is an efficient device permitting the precharging of the components of a split air conditioning system by a manufacturer at its own factory. This coupling was developed by Aeroquip and marketing began in 1961 (R. Inst. No. 9). Prior to the commencement of marketing of the 5700 Series coupling, Aeroquip unilaterally, without consultation, discussion, agreement, or understanding of any kind with anyone outside Aeroquip's own organization, decided upon the manner in which it would market the 5700 Series coupling and the type of customers to which it would sell the coupling (R. 33, 476). That policy was that Aeroquip would sell its 5700 Series coupling only to manufacturers of complete air conditioning systems (R. 33, 476). In addition, Aeroquip would sell couplings to entities which were making a part of a system for a complete system manufacturer such as General Electric after verifying by letter

that the part maker was indeed supplying the part which required the coupling to the complete system manufacturer (R. 33, 476).

The 5700 coupling is not the only device which is available to manufacturers to accomplish precharging (R. 200). Several other manufacturers market valves or couplings by the use of which precharging may be performed and such devices are in fact used by some of the large air conditioning manufacturers such as Carrier Corporation (R. 123, 124, 201, 383, 517).

General Electric[3] manufactures complete air conditioning systems in numerous sizes, styles and capacities, some of which incorporate the precharged concept by use of the 5700 Series coupling (R. 371). It began purchasing the 570 Series coupling in 1963 (R. 204). Until 1966, General Electric had no knowledge of the Aeroquip marketing policy regarding such coupling (R. 227). General Electric did write letters to Aeroquip informing it that United Electric and others were manufacturing component parts of an air conditioning system for General Electric. However, when the request was made by Aeroquip that General Electric write such letters, General Electric protested the necessity for such letters (R. 219, 220). Weather Wise stipulated in open court that it had no evidence that General Electric in any way participated in the formulation of Aeroquip's sales policy and there was no such evidence introduced at the trial concerning any other entity which had ever been named as co-conspirator in any pleading or otherwise.

---

[3] General Electric was the only alleged co-conspirator from which evidence was adduced at the trial with the exception of Borg-Warner Corporation. Plaintiffs' deposition summary of the Borg-Warner witness merely stated what that witness conceived to be the benefit to Borg-Warner which lay in the marketing policy of Aeroquip (R. 499).

Since March of 1969, Weather Wise has been engaged in the business of manufacturing the evaporative coil and air handler portion of air conditioning systems (R. 236). At some point subsequent to 1969, Weather Wise began manufacturing precharged tube sets for split system application. Weather Wise has never manufactured a complete air conditioning system (R. 237, 442-443). Weather Wise on several occasions attempted to purchase the 5700 Series coupling for use on its products direct from Aeroquip. With one immaterial exception, Aeroquip has refused to sell the 5700 coupling to Weather Wise (R. 280-281).

Running contrary to Weather Wise's plea that the only alternative available to those who did not obtain 5700 series couplings was to purchase stub kits, is the testimony offered by Weather Wise during the trial that there are many other couplings and systems available to achieve the precharge concept (R. 123-124, 200-201, 383, 517).

The Weather Wise idea that Aeroquip delegated to any OEM its decision to sell or not to sell to anyone is not substantiated by the record and is not true. Aeroquip alone determined that it would sell only to OEMs or their suppliers and there is not one shred of evidence to the contrary.

Weather Wise appears to argue that because an OEM lied to Aeroquip about one of its suppliers, Metal Fab (R. 155-158) and stated Metal Fab was a supplier when in fact that was untrue, or Magic Aire supplying another OEM, purchased more couplings than allegedly needed, Aeroquip is responsible to Weather Wise for its failure to police these incidents. (Weather Wise Petition, p. 6). Weather Wise admits that when it complained of these "injustices" Aeroquip unilaterally sought to determine if certain manufacturers or vendors were misrepresenting their situation to Aeroquip. (Weather Wise Petition, p. 7). Weather Wise's own witness Charlie Siegel of Golden Cres-

cent testified that Aeroquip merely followed its own policy in that it sold him couplings when he manufactured a complete system and did not sell to him when he ceased manufacturing a complete system.

Weather Wise argues that Aeroquip sought to impose resale restrictions upon the purchasers of couplings in the face of the finding by the trial judge that there were no such restrictions (R. 604-609), and the testimony of witness after witness whose testimony was summarized to the effect that no limitation upon resale existed or had ever been suggested (R. 45, 46, 75, 76, 478). Aeroquip did refuse to place Southwest Manufacturing in the position of a distributor of couplings when Southwest announced that it planned to purchase one quantity for resale and one quantity for its own use (R. 197-198). Aeroquip simply refused to set up a distributor because its policy was to sell only to OEMs or users.

Like it or not the entire case centered around the proposition that Aeroquip was considered to be a public utility with no right to select its customers. The 5th Circuit properly disagreed and reversed and rendered.

ARGUMENT

The Undisputed Evidence Negates The Existence of Any Combination in Violation of Section 1 of the Sherman Act.

The "Question Presented" by Weather Wise in its Petition is based on *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968). The reasons then given by Weather Wise for its request to grant this writ demonstrate why Aeroquip prevailed when public utility concepts were taken out of this case in the Court of Appeals and the antitrust laws as applied to Aeroquip's policy came in.

Weather Wise contends that Aeroquip stepped outside the narrow corridor of *Colgate*[4] and into the mine field of *Parke Davis*[5] and *Albrecht* by involving its customers in the writing of letters verifying that a given vendor was manufacturing components for the customer. Such involvement of the OEM customers furthered the objective of Aeroquip of maximizing profits because it caused Aeroquip to make sales. But the letters written by the OEM customers did not cause Aeroquip to refuse to sell to Weather Wise or anyone else. The letters did not further a refusal to deal, they brought about a sale.

Weather Wise by sheer sophistry, attempts to turn the facts 180 degrees to a situation in which Aeroquip has given its right to determine and select its customers to the OEM accounts who wrote letters in favor of vendors. Reality must, however, in the end govern the outcome of litigation, and skill in semantics should not cloud reason. The reality is that Aeroquip unilaterally decided that it would not sell to anyone other than OEM customers who met the criteria set forth in the letter from Aeroquip to Weather Wise (Weather Wise Petition, p. 4). The letters written did not, as Weather Wise argues, give to Aeroquip's customers any say whatever as to those to whom Aeroquip would *refuse* to sell. That had already been decided by Aeroquip. The letters were written to cause a sale to be made that would not otherwise have been made. Thus the only logical conclusion which can be drawn from the evidence is that the refusal to sell to Weather Wise was wholly unilateral and not a course taken by Aeroquip in "combination" with anyone.

In the face of the undisputed evidence, which is the only evidence in this record, that Aeroquip unilaterally, without

---

4. *United States* v. *Colgate & Co.* 250 U.S. 300 (1919).
5. *U.S.* v. *Parke, Davis and Co.*, 362 U.S. 29 (1960).

consultation or discussion of any kind with anyone outside its own organization, formulated its policy for the sale of 5700 series couplings, the trial court instructed the jury that a combination in violation of Section 1 of the Sherman Act was formed when General Electric and other customers of Aeroquip wrote letters to Aeroquip at Aeroquip's request verifying that some component manufacturer was building components for Aeroquip's customers. The exact language of the court in its charge was:

> "This case is based upon a claimed violation of Section 1 of what is popularly called the Sherman Antitrust Act [which] provides in its material parts as follows: 'Every . . . combination . . . in restraint of trade or commerce among the several states is . . . illegal . . . .'
>
> "As this case originally started to trial, General Electric was a defendant in the case. The evidence developed that General Electric was at all material times an OEM[6] and that General Electric followed the policy which we will later discuss, developed by Aeroquip relating to the sale of 5700 Series Aeroquip couplings. Consequently, the required combination was formed.
>
> "For your purposes, General Electric is out of this case except insofar as I have told you that from the evidence developed General Electric followed Aeroquip's policy and in that connection the required combination mentioned in Section 1 of the Sherman Act was formed." (R. 700, 702).

Although the court correctly instructed the jury that:

> "In the absence of any combination that unreasonably restrains trade or commerce in the market involved (in this case the manufacturing of air conditioning equipment), the Act does not restrict the long

---

[6] Under Aeroquip's policy, only manufacturers of all the parts of a complete air conditioning system were classified as OEMs or "Original Equipment Manufacturers."

> recognized right of the trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell;"

the court again instructed the jury:

> "Aeroquip had a right to follow this policy as long as it acted alone and not in concert with or as a result of a combination with anyone else. But here Aeroquip brought OEM's such as General Electric into its policy by selling its 5700 series refrigerant couplings to non-OEM's if an OEM informed Aeroquip that the non-OEM was a vendor of the OEM. In other words, Aeroquip combined with the OEM's, such as General Electric, that wrote letters to Aeroquip in favor of certain non-OEM's asking Aeroquip to sell 5700 series refrigerant couplings to these non-OEM's." (R. 705, 706).

As may be seen from the portions of the charge quoted, the notion that Aeroquip and any of its customers agreed, combined or conspired as to what the terms of Aeroquip's sales policy would be is simply not in this case. Aeroquip unilaterally set that policy. There is not one shred of evidence that any customer of Aeroquip did anything whatsoever to cause Aeroquip not to sell its couplings to anyone. The entire basis for the court's finding a Section 1 "combination" was that General Electric wrote letters in accord with Aeroquip's policy when requested to do so although complaining of the necessity for the letters. The letters required by Aeroquip's policy did not result in a refusal to sell to anyone. To the contrary, the letters triggered sales, not refusals to sell. The refusal to sell by Aeroquip must therefore be considered unilateral and lawful under the applicable decisions construing Section 1.

The leading decision of the Supreme Court touching this controversy is *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960). In that decision, the Court reviews in depth the evolution of the law since the decision of *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919). It was in *Colgate* that the classic statement was made that:

> "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce — in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell." 250 U.S. at page 307.

In that case the district court had quashed an indictment charging Colgate with combining with wholesalers and retailers to procure adherence to resale prices fixed by Colgate. The activities engaged in by Colgate are summarized in the opinion:

> "Distribution among dealers of letters, telegrams, circulars and lists showing uniform prices to be charged, urging them to adhere to such prices and notices, stating that no sales would be made to those who did not; requests, often complied with, for information concerning dealers who had departed from specified prices; investigation and discovery of those not adhering thereto and placing their names upon 'suspended lists'; requests to offending dealers for assurances and promises of future adherence to prices, which were often given; uniform refusals to sell to any who failed to give the same; sales to those who did;" Id. at 303.

Thus, the quantum of Colgate's activities in support of its policy of price maintenance far exceeds that of Aeroquip in following its policy of selection of customers. Colgate caused its distributors to further the price maintenance policy by selling only to dealers who maintained retail prices. Aeroquip did nothing but refuse to deal with those who were not original equipment manufacturers or their suppliers. It did nothing to prohibit owners of couplings from disposing of them to anyone at any price. Aeroquip, unlike Colgate, was not seeking to fix or maintain prices — a practice classically a violation of antitrust law. Despite the obvious price maintenance objectives behind Colgate's activities, the Court unanimously affirmed the decision of the district court, viewing Colgate's action as privileged because it was unilateral.

Since *Colgate*, this Court has withdrawn from its rather expansive stance with regard to refusals to deal where price fixing was the object of the refusal. However, that retrenchment has occurred only where refusals to deal have been employed as a device for the promotion of price maintenance. The Court has consistently refused to overrule Colgate and, in the absence of an unlawful purpose, such as price fixing to be achieved by refusals to deal, has in no way diminished the basic freedom of traders to choose their customers firmly established by *Colgate*.

After a few intermediate cases such as *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 256 U.S. 208 (1920), *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1921), and *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944), all dealing with price maintenance, the Court decided *Parke, Davis*. In that case, much as in *Colgate*, *supra*, defendant Parke, Davis sold to wholesalers who in turn sold to retailers with resale prices established by Parke, Davis at each level. If the retailers failed to main-

tain Parke, Davis' recommended resale prices, the wholesalers would cut off the retailer violating that policy, and if the wholesaler did not cut off the offending retailer, the wholesaler would be cut off by Parke, Davis.

Despite the apparent similarities to *Colgate, supra,* the government in Parke, Davis contended that:

> ". . . subsequent decisions of this Court compel the holding that what Parke, Davis did here by entwining the wholesalers and retailers in a program to promote general compliance with its price maintenance policy went beyond *mere customer selection* and created combinations or conspiracies to *enforce resale price maintenance* in violation of §§ 1 and 3 of the Sherman Act." 362 U.S. at 37 (Emphasis added).

The Court agreed with the government that Parke, Davis had gone beyond the bounds of *Colgate.* In distinguishing *Colgate,* the Court made the following observations as to how Parke, Davis accomplished adherence to its prices.

> "The program upon which Parke Davis embarked to promote general compliance with its suggested resale prices plainly exceeded the limitations of the Colgate doctrine and under Beech-Nut and Bausch & Lomb effected arrangements which violated the Sherman Act. Parke Davis did not content itself with announcing its policy regarding retail prices and following this with a simple refusal to have business relations with any retailers who disregarded that policy. *Instead Parke, Davis used the refusal to deal with the wholesalers in order to elicit their willingness to deny Parke Davis products to retailers and thereby help gain the retailers' adherence to its suggested minimum retail prices.* The retailers who disregarded the price policy were promptly cut off when Parke Davis supplied the wholesalers with their names. The large retailer who said he would 'abide' by the price policy, the multi-unit Peoples Drug chain, was not cut off. *In thus involving*

the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act. Although Parke Davis originally announced wholesalers' policy would not under Colgate have violated the Sherman Act if its action thereunder was the simple refusal without more to deal with wholesalers who did not observe the wholesalers' Net Price Selling Schedule, that entire policy was tainted with the 'vice of ••• illegality,' cf. United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 724, 64 S.Ct. 805, 814, 88 L.Ed. 1024, *when Parke Davis used it as the vehicle to gain the wholesalers' participation in the program to effectuate the retailers' adherence to the suggested retail prices.*" (at 45-46) (Emphasis added).

The last Supreme Court pronouncement concerning unilateral refusals to deal is in *Albrecht* v. *The Herald Co.* 390 U.S. 145 (1968). There, the Court stated:

"If a combination arose when Park Davis threatened its wholesalers with termination unless they put pressure on their retail customers, then there can be no doubt that a combination arose between respondent, Milne, and Kroner to force petitioner to conform to the advertised retail price. When respondent learned that petitioner was overcharging, it hired Milne to solicit customers away from petitioner in order to get petitioner to reduce his price. It was through the efforts of Milne, as well as because of respondent's letter to petitioner's customers, that about 300 customers were obtained for Kroner. Milne's purpose was undoubtedly to earn its fee, but it was aware that the aim of the solicitation campaign was to force petitioner to lower his price. Kroner knew that respondent was giving him the customer list as part of a program to get petitioner to conform to the advertised price, and he knew that he might have to return the customers if petitioner ulti-

mately complied with respondent's demands. He undertook to deliver papers at the suggested price and materially aided in the accomplishment of respondent's plan. Given the uncontradicted facts recited by the Court of Appeals, there was a combination within the meaning of § 1 between respondent, Milne, and Kroner, and the Court of Appeals erred in holding to the contrary." Id. at 149-150.

Thus, under *Parke, Davis,* to escape *Colgate,* a plaintiff must show that the refusal to sell by the defendant was used to involve someone else in the refusal — to cause someone else to refuse to sell or threaten to do so in aid of the final objective, price maintenance, which is itself an unlawful restraint of trade. In this, Weather Wise has totally failed and the seizure of the trial court upon the writing of letters of the sort here involved by General Electric or other customers of Aeroquip, as sufficient involvement with outsiders to form a "combination" within *Parke, Davis* as a matter of law was held to be completely erroneous by the 5th Circuit.

There is not even a hint of price fixing or maintenance in this case. The involvement of Aeroquip's customers caused Aeroquip to make sales that it otherwise would not have made. There is no evidence that can fairly be read to the effect that Aeroquip in any way prevented anyone from selling couplings to Weather Wise or anyone else.[7] Thus,

---

[7] By deposition summary introduced by Weather Wise as portions of the deposition of J. C. Owens (R. 190-191, 195-196), it was developed that Aeroquip refused to sell couplings to Southwest Manufacturing Co. for resale when Aeroquip was informed by Southwest that Southwest intended to resell couplings. No restriction was placed by Aeroquip upon Southwest as to what it might do with couplings which it had purchased. Aeroquip simply refused to make a distributor of Southwest for, under its policy, Aeroquip did not sell to distributors. This incident went out of the case when the court found a "combination" as a matter of law based entirely upon the writing of the letters by Aeroquip's customers.

the only proper conclusion which could be drawn from the evidence was that as a matter of law there was no "combination."

In this case there is no evidence that anyone ever asked Aeroquip not to sell to anyone else.

In a nut shell Aeroquip's position is this:

The policy of Parke, Davis was to sell to people who maintained prices and refuse to sell to people who sold to those who did not maintain prices. It is not difficult logically to find a "combination" when the middle man "goes along" or when the retailer reports that his competitor has not "gone along" thus triggering the multilateral refusal to supply. Others than the manufacturer become actively "entwined" in the refusal to sell. The distributor himself joins in the coercive action by refusing to sell to the dealer. *Albrecht* presents a different situation but one subject to an equally simple analysis. People were brought into the distribution system by actual agreement to exert coercive force upon the misbehaving dealer to bring his prices in line. According to the opinion of the Court, everyone understood the purpose of the arrangement — once Albrecht got in line the deal was over. Albrecht got in line for a time but jumped the track and was cut off.

Where is the similarity between any of these cases and the one at bar? The "involvement" of the General Electric which wrote the letters requested by Aeroquip did not prevent sales, it brought about sales that otherwise would not have been made. The "entwinement" of Aeroquip's customers which the trial court found as a matter of law to give birth to an unlawful "combination" did not fix a price, tend toward a monopoly, or prevent anyone from obtaining 5700 series couplings.

If one may, with impunity, cease to sell where a price fixing or other unlawful motive is not the basis for the action will the law say that one may not unilaterally refuse to begin to sell in such circumstances? Does the fact that someone owns, by virtue of his own initiative, a desirable item mean that he will be compelled to dispense it to all at their whim? To pose these questions is to supply the immediate answer. That answer is supplied by *Colgate* and it is "NO".

Weather Wise would virtually make Aeroquip a public utility with no right to select its customers when it is an "entirely private business." Indeed the confusion of the trial court as to the applicable law may be seen at R. 321-322.

This is not a public utility case. This is a case in which commercial rights are governed by the laws which regulate competition.

There being no evidence in this case from which one could infer an unlawful "combination," the judgment below was properly reversed and rendered against Weather Wise.

The injection of *Schwinn*[8] into this cause is fated for rejection because the heart of that case is completely incompatible with the tissue of this one. *Schwinn* dealt with restrictions placed upon the resale of goods dominion over which had passed to the purchaser. The evidence cited by Weather Wise does not show any such restriction in this case. What the evidence shows is merely that Aeroquip would not knowingly sell couplings for resale. Once Aeroquip had sold its couplings it did nothing to prevent the purchaser from doing with them as the purchaser saw fit.

The complete fallacy in the position of Weather Wise is clear. Weather Wise argues that if Aeroquip had made

---

[8] *U.S.* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967).

no provision in its unilaterally devised policy for sales to vendors of components that no combination would have been formed. If Aeroquip had refused to sell to component manufacturers under any circumstances no combination would have been formed. It was the mere fact that letters were written which opened sales to certain vendors which formed the basis for the finding of a combination by the trial court as a matter of law. What the complaint of Weather Wise seems to be is that it was unable to find an OEM (although the record is silent as to any attempt on the part of Weather Wise) which would misrepresent to Aeroquip that Weather Wise was constructing components for such OEM. What Weather Wise contends is that it is entitled to purchase anything it wants regardless of the desire of the owner to sell. The law does not suggest, much less compel this result.

CONCLUSION

The undisputed facts, as recited by the 5th Circuit show that there was no "combination" between Aeroquip and any other entity pursuant to which Aeroquip or anyone else refused to sell couplings to Weather Wise or anyone else. The finding of no combination by the 5th Circuit as a matter of law was proper and this Petition should be denied.

Respectfully submitted,

.....

JOHN LEROY JEFFERS
2100 First City National
Bank Building
Houston, Texas 77002

Attorney for Respondent
Aeroquip Corporation

Of Counsel:

ROSS N. STERLING
2100 First City National
Bank Building
Houston, Texas 77002

JOHN H. SCHOMER
1100 City Bank Building
Jackson, Michigan 49201

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33, paragraph 1 of this Court, three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari was served upon Counsel for Petitioner by placing the same in the United States mail, first class postage prepaid addressed to counsel of record for Respondent at his post office address this ..... day of February, 1973, thus serving all parties required to be served.

.....

JOHN LEROY JEFFERS

First City National Bank
Building
Houston, Texas 77002

Counsel for Respondent